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In the Supreme Court of the United States

GUY PIERCE and MARK A. PIERSON,

Petitioners,

v.

RANDY BOSS and REVELL BOSS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the majority of the Seventh Circuit unreasonably broadened the information covered by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963), when the information discovered by the prosecution was a statement from a cooperating defense witness equally available to the defense through the exercise of due diligence, simply because the Seventh Circuit found the information was an unanticipated statement as opposed to a document?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Guy Pierce and Mark A. Pierson, respectfully ask this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Judicial Circuit to review that court's judgment and opinion entered on August 31, 2001, and its denial of Petitioners' petition for rehearing and suggestion for rehearing en banc on November 26, 2001.

OPINION BELOW

The United States Court of Appeals for the Seventh Judicial Circuit, one judge dissenting, issued its opinion reversing the decision of the United States District Court and granting habeas corpus relief on August 31, 2001. That decision is published as *Boss v. Pierce*, 263 F.3d 734 (7th Cir. 2001), and is reprinted in the appendix to this petition. The November 26, 2001 order of that Court denying Petitioners' petition for rehearing and suggestion for rehearing en banc is reported at 2001 U.S. App. LEXIS 25498 (7th Cir. Nov. 26, 2001) and is also reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on August 31, 2001, and rehearing was denied on November 26, 2001. Jurisdiction in this Court is proper under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois asserted jurisdiction in this case pursuant to 28 U.S.C. §2254, and the United States Court of Appeals for the Seventh Circuit asserted jurisdiction under 28 U.S.C. §§1291 and 2253.

Respondents Randy and Revell Boss were convicted by a Cook County, Illinois jury of the first degree murder and robbery of Eugene Oliver. The trial court sentenced Randy Boss to concurrent terms of 50 years for murder and seven years for robbery, and sentenced Revell Boss to 40 years for murder and seven years for robbery. On March 15, 1996, the Illinois appellate court, first judicial district, affirmed Respondents' convictions and sentences. *People v. Boss*, 278 Ill.App.3d 1129, 699 N.E.2d 604, 1996 Ill.App.LEXIS 1187 (Unpublished order under Illinois Supreme Court Rule 23).

On April 23, 1997, Respondents filed petitions for writs of habeas corpus pursuant to 28 U.S.C. §2254, asserting, amongst other claims of error, that the state withheld exculpatory evidence in violation of this Court's ruling in *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioners filed an Answer to the petitions, and on September 14, 1998, the district court denied Respondents' petitions for writ of habeas corpus. *Boss v. DeTella*, No. 97 C 2874 (U.S. Dist. 1998). On October 15, 1998, the district court issued a minute order finding the *Brady* issue sufficiently uncertain as to warrant a certificate of appealability under the standard of 28 U.S.C. §2253(c)(2).

Respondents filed their brief on September 24, 1999. On February 3, 2000, the Petitioners filed their brief, and on February 22, 2000, Respondents filed their reply brief. Oral arguments were heard on April 18, 2000, and the case was taken under advisement. On August 31, 2001, the United States Court of Appeals for the Seventh Judicial Circuit, with one judge dissenting, reversed the decision of the dis-

trict court denying Respondents' petitions for writ of habeas corpus, and remanded the case with instructions to grant Respondents' writs of habeas corpus unless the state retried Respondents within 120 days. The majority found that the state appellate court's determination that no evidence was suppressed by the prosecution since the witness who gave the statement to the prosecution was a cooperating defense witness, equally available to the defense, was an "unreasonable application of" *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *Boss v. Pierce*, 263 F.3d 734, 742-743 (7th Cir. 2001). The majority found that, unlike information contained in a document, exculpatory information contained in a cooperating defense witness' head cannot be considered to be available to defense counsel through the exercise of due diligence if not specifically anticipated as information that the witness would possess, since mind-reading is beyond the abilities of even the most diligent attorney. *Boss*, 263 F.3d at 742-743. The majority believed that the state appellate court's ruling suggested that reasonable diligence required Respondents' counsel to ask the witness the specific question to elicit the response, in this case asking the defense witness what the key eyewitness had been saying around the neighborhood regarding the fact that he, in fact, had committed the crime. *Boss*, 263 F.3d at 743. The majority found that requiring defense counsel to ask his witness the specific question to elicit the information gained by the prosecution was an unreasonable application of *Brady* and its progeny to the facts of this case. *Id.* The majority added that this Court has described the *Brady* rule as applying to information known to the prosecution but "unknown" to the defense, and while it was reasonable to apply that precedent to information the defense can be expected to discover, counsel could not have been expected to discover that his own witness knew the state's key eyewitness had been stating in the neighborhood that he had committed the crime. *Boss*, 263 F.3d at 744.

On September 13, 2001, Petitioners filed their petition for rehearing with suggestion for rehearing en banc. The court ordered Respondents to reply to the petition for rehearing, and Respondents did so on October 9, 2001. On November 26, 2001, the Court of Appeals denied Petitioners' petition for rehearing, and on December 10, 2001 issued an order granting Petitioners' petition to stay issuance of the mandate pending the filing of this Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION OF THE SEVENTH CIRCUIT HAS UNREASONABLY BROADENED THE INFORMATION COVERED BY THIS COURT'S OPINION IN *BRADY v. MARYLAND*, 373 U.S. 83 (1963), WHEN THE INFORMATION DISCOVERED BY THE PROSECUTION WAS A STATEMENT FROM A COOPERATING DEFENSE WITNESS EQUALLY AVAILABLE TO THE DEFENSE THROUGH THE EXERCISE OF DUE DILIGENCE.

The majority opinion of the United States Court of Appeals for the Seventh Judicial Circuit in the case below found that it was an "unreasonable application of" this Court's opinion in *Brady v. Maryland*, 373 U.S. 83 (1963), for the state appellate court to hold that the information garnered by the prosecution from the Respondents' own cooperating defense witness was equally available to the defense, and thus not covered by *Brady*. In so finding, the majority below has unnecessarily and unreasonably broadened the information which this Court has determined is covered by *Brady* to include information obtained by the state from a cooperating defense witness[1] through an

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[1] The information that the prosecution obtained from the cooperating defense witness four days prior to trial was that the (continued...)

interview with that witness, equally available to defense counsel, merely if defense counsel fails to ask the correct question to garner that information through the exercise of due diligence. The majority incorrectly applied this Court's rulings in *Kyles v. Whitley*, 514 U.S. 419 (1995), *United States v. Bagley*, 473 U.S. 667 (1985), and *United States v. Agurs*, 427 U.S. 97 (1976), and found that "actual knowledge" is the key consideration in determining whether non-documentary evidence is available to the defense for *Brady* purposes, contrary to the decisions which have interpreted *Brady* as only applying to information not available to defense counsel through due diligence. The majority further has placed an unreasonable burden on prosecutors to determine what statements garnered by them through an interview with a cooperating defense witness could be said to be information defense counsel would have known that witness possessed, or if the statement pertained to knowledge defense counsel did not know the witness possessed, in order to determine what they need to turn over as *Brady* material.

The federal habeas corpus statute authorizes relief if the state court adjudication of a federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). The majority in this case found that the state appellate court's decision was not "contrary to" clearly established Federal law, as determined by the Supreme

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[1] (...continued)
state's main witness against the Respondents was bragging to people, including one Richard Mitchell, that he in fact, committed the crimes for which Respondents were convicted. The state revealed this information in a report of its interview with the witness on the last day of Respondents' trial. A motion for a continuance made by Respondents was denied by the trial court.

Court of the United States, but found that the decision involved an "unreasonable application" of clearly established Federal law. *Boss v. Pierce*, 263 F.3d 734, 741 (7th Cir. 2001). However, a state determination may be set aside under this standard only if, under clearly established Federal law, the state court was unreasonable in refusing to extend the governing legal principle that should have controlled. *Ramdass v. Angelone*, 530 U.S. 156, 165 (2000). A Federal court may not grant habeas corpus relief simply because it has independently concluded that the relevant state court decision misapplied clearly established Federal law; the decision's application of Supreme Court precedent must be so erroneous as to be unreasonable. *Williams v. Taylor*, 529 U.S. 362, 409-410 (2000). Not only was the state appellate court's decision in this case not an unreasonable application of clearly established Federal law, it was the correct application of that law. The majority independently concluded that the state court decision misapplied clearly established Federal law, and in so doing, issued an opinion wherein that court unreasonably broadened the information covered by this Court's opinion in *Brady* and its progeny.

In *Brady v. Maryland*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." *Brady*, 373 U.S. at 87. To make out a *Brady* violation, a defendant must establish that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material to an issue at trial. It has been well-recognized that the government will not be found to have suppressed material information if that information also was available to a defendant through the exercise of reasonable diligence. *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996). See also *United States v. Hansen*, 262 F.3d 1217, 1235 (11th

Cir. 2001); *United States v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990), *United States v. Zagari*, 111 F.3d 307, 320 (2nd Cir. 1997), *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997). While the majority below recognized this principle, it failed to properly analyze what constitutes due diligence, and in so doing, greatly expanded the information the prosecution is required to disclose, and greatly limited what a defense counsel is required to do.

Again, where information is equally available to the defense as to the prosecution, the defendants cannot obtain a new trial by insisting that the government should have conducted their investigation for them. *United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996), *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990). To defeat a *Brady* claim, the defense need not be aware of the specific details of the exculpatory information or precisely what it is so long as the defense knew of and had access to the material that contained, or the witness who possessed, such information, in other words, where "defendants had been given the same opportunity as the government to discover the identified documents." *Parks*, 100 F.3d at 1307.

In finding that the state appellate court's decision was an unreasonable application of *Brady* and its progeny, the majority in this case determined that it was an unreasonable application of *Brady* for the state court to rule that information possessed by a defense witness was available through the exercise of due diligence where that information is not of a type defense counsel could reasonably expect that witness to possess. *Boss*, 263 F.3d at 742. In so finding, the majority misconstrued the appellate court's ruling as suggesting that reasonable diligence on the part of defense counsel required him to ask the witness the specific question to get the information obtained by the prosecution. *Boss*, 263 F.3d at 742-743. The court also misconstrued the appellate court's opinion as suggesting a blanket rule that

every piece of knowledge in a defense witness' head should be discovered by counsel merely because of the relationship of the witness, regardless of the circumstances of the case. This is not, however, what the appellate court decided. The appellate court simply found that, where the prosecution had no greater access to the cooperating defense witness or her information than defense counsel, and no greater means than defense counsel to garner the information obtained, requiring defense counsel to interview his witness sufficiently was a reasonable requirement of a reasonably diligent attorney.[2]

The Seventh Circuit's majority decision has severely minimized what a defense counsel must reasonably be expected to do. The majority's decision suggests that this Court has implied a focus on actual knowledge as the key consideration in determining whether evidence is available to the defense for *Brady* purposes. *Boss*, 263 F.3d at 743-744, citing to this Court's descriptions in *Kyles v. Whitley*, 514 U.S. 419 (1995), *United States v. Bagley*, 473 U.S. 667, 678 (1985), and *United States v. Agurs*, 427 U.S. 97, 103 (1976) to information known to the prosecution but "unknown to the defense." However, those statements are made in the context of determining what is material for purposes of disclosure. While the majority correctly recognized that refusing to characterize as *Brady* material information the defense can be expected to discover is consistent with a focus on actual knowledge, the court continued that "[F]urther extension of the limits on *Brady* material to include information the defense could not be expected to discover cannot be reconciled with such a focus." *Boss*, 263 F.3d at 743. However, the court's interpretation of what counsel should be expected to discover is inconsistent with the cases

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[2] The Seventh Circuit suggested that the appellate court's decision required defense counsel to be a "mind-reader." *Boss*, 263 F.3d at 741.

interpreting *Brady*. See *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (there is no *Brady* violation if the information is not only available to defendant but also lies in a source where a reasonable defendant would have looked.)

The majority's opinion also suggests that there is a distinction between the fact that the information here was not contained in a document, but in the defense witness' mind, and thus defense counsel cannot be accountable for not uncovering the information. However, the reasonable diligence requirement has frequently been applied to evidence that was unwritten. See, e.g., *United States v. Zagari*, 111 F.3d 307, 320 (2nd Cir. 1997), *Hoke v. Netherland*, 92 F.3d 1350, 1355-56 (4th Cir. 1996). As noted by the dissent in this case, "Indeed, obtaining information through questioning often requires less diligence than sorting through papers." *Boss*, 263 F.3d at 747.

The majority's opinion is also inconsistent with the Seventh Circuit's own previous rulings. In *United States v. Hamilton*, 107 F.3d 499 (7th Cir. 1997), that court reiterated the well-established principle that the government will not be found to have suppressed information if that information was available to the defense through the exercise of due diligence. *Hamilton*, 107 F.2d at 510. The court noted that Hamilton had hired an investigator who interviewed the witness and could have questioned him about previous descriptions. As found by the district court in *Hamilton*, "any investigator worth his or her salt would have asked [the witness] had he given any statements." *Hamilton* does not rest on the defense's possession of information indicating what specific question should have been asked. Rather, it rests on the simple fact that the bank teller in *Hamilton* was a witness the defense should have known to ask whether he had given any prior statements to the police. Here, defense counsel merely had to ask his own cooperating witness if she had any information which would be helpful

to the defense. Requiring such was not unreasonable. The fact that the proposed information was contained in a witness' mind rather than a document is not a reason for excusing defense counsel's failure to uncover information known by one of its own cooperating witnesses, especially where the defense knew of and had at least the same access to the information as the prosecution.

It is simply not an unreasonable application of *Brady* to rule that information possessed by a cooperating defense witness was equally available to the defense through the exercise of reasonable diligence by a simple interview or investigation. Cases denying *Brady* claims have often relied on the fact that the witness with the exculpatory material was either a defense witness or cooperated with the defense. See *Stockton v. Murray*, 41 F.3d 920, 925 (4th Cir. 1994), *United States v. Dean*, 722 F.2d 92, 95 (5th Cir. 1983), *United States v. Natale*, 526 F.2d 1160, 1171 (2nd Cir. 1975), *United States v. Fogg*, 652 F.2d 551, 559 (5th Cir. 1981), *United States v. Oliver*, 908 F.2d 260, 262 (8th Cir. 1990). The question is whether the information was equally available to the defense as to the prosecution through the exercise of due diligence.

The majority's decision here directly conflicts with the decisions which find that *Brady* material does not include material equally available to defendant through the exercise of due diligence, and unreasonably and unnecessarily expands the information subject to disclosure under *Brady* to include such information. The *Brady* rule is to "ensure that a miscarriage of justice does not occur, 'not to displace the adversary system as the primary means by which truth is uncovered.'" *Bagley*, 473 U.S. at 675. Contrary to the implied holding in this case, *Brady* does not require the prosecution to conduct a defendant's investigation or to assist in the presentation of the defense's case. In fact, the holding in this case places an unreasonable burden on the prosecution to decide, after interviewing a cooperat-

ing defense witness, what information defense counsel knew or did not know existed, and then tender the information defense counsel could not have known of, instead of allowing the prosecution to rely on an assumption that defense counsel conducted a thorough and adequate interview of his own witness. Certiorari should be granted to clarify what a reasonable defense attorney must do, and to halt this unreasonable requirement of what the prosecution must do.

CONCLUSION

For the aforementioned reasons, Petitioners, Guy Pierce and Mark A. Pierson, respectfully request that this Honorable Court grant *Certiorari*, reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

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